DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. PARAMOUNT CLEANERS and THADEUS ARRINGTON Respondents	Case Nos.: I-00-10356 I-00-10378

FINAL ORDER

I. Introduction

On September 5, 2000, the Government served a Notice of Infraction (No. 00-10356) on Respondents Paramount Cleaners and Thadeus Arrington, alleging that they violated 20 DCMR 903.1, which forbids the emission of certain odorous or other air pollutants, and 20 DCMR 707.1(b), which requires the owner or operator of a perchloroethylene dry cleaning facility to operate the air pollution control device for the dryer exhaust to achieve a 90% reduction in the emissions of volatile organic compounds. The Notice of Infraction alleged that the violations occurred on August 3, 2000 at 608 H Street, N.E., and sought a fine of $100.00 for each violation.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C.

Code § 6-2715). Accordingly, on October 18, 2000, this administrative court issued an order finding Respondents in default, assessing a statutory penalty as authorized by D.C. Code § 6-2704(a)(2)(A), and requiring the Government to serve a second Notice of Infraction.

The Government then served a second Notice of Infraction (No. 00-10378) on October 24, 2000. Respondents also did not answer that Notice within twenty days of service. Accordingly, on December 22, 2000, a Final Notice of Default was issued, finding Respondents in default on the second Notice of Infraction and assessing penalties pursuant to D.C. Code §§ 6-2704(a)(2)(A) and 6-2704(a)(2)(B). The Final Notice of Default also set January 17, 2001 as the date for an *ex parte* proof hearing, and afforded Respondents an opportunity to appear at that hearing to contest liability, fines, penalties or fees. Copies of both the first and second Notices of Infraction were attached to the Final Notice of Default.

On January 17, 2001, the Government, represented by Jacques Lerner, Esq., appeared for the hearing. There was no appearance for the Respondents. Based upon the testimony at the hearing, my evaluation of the credibility of the Government's witness, the documents admitted into evidence, and the entire record in this case, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

On August 3, 2000, Babatunde Adebona, an inspector employed by the Department of Health, inspected a dry cleaning facility operated by Respondent Paramount Dry Cleaners.

Respondent Thadeus Arrington is the owner of Paramount and was present during the inspection. Before entering the facility, Mr. Adebona detected an odor of percholorethylene on the public street. Mr. Adebona had parked his car at least 15 feet from the facility's entrance, and he smelled the percholorethylene immediately upon exiting the car. Mr. Adebona is an experienced air pollution control inspector, who has inspected hundreds of dry cleaning facilities over the past four years. Based upon his experience, I credit his testimony that the odor he smelled was perchloroethylene, a chemical commonly used in dry cleaning. He described the odor on the street as an unpleasant, chemical-type odor.

Upon entering Respondents' facility, Mr. Adebona determined that the source of the odor was a dry cleaning machine at the facility. The machine in question was a dryer that had a defective gasket around its door. Due to that defect, percholorethylene vapors were escaping through the gasket and were not being drawn through the dryer's carbon adsorption system, an air pollution control device designed to reduce emissions of perchloroethylene into the air.

Using a portable measuring device, Mr. Adebona found that percholoroethylene concentrations of 300 parts per million ("ppm") were being emitted from the dryer door. He did not test the air inside the dryer, but expressed the opinion that the concentration of perchloroethylene inside the dryer was no more than 500 ppm and, therefore, that the perchloroethylene emissions from the dryer were not being reduced by at least 90%.[1]

[1] As will become clearer below, I do not need to decide whether there is an adequate foundation for Mr. Adebona's opinion testimony that the concentration of perchloroethylene inside the dryer was no more than 500 ppm.

Mr. Adebona had visited Respondents' facility previously on July 14, 2001 and on one other occasion at the end of July. On both occasions, he found that the gasket on the dryer door was broken and that perchloroethylene fumes were escaping from the dryer and reaching the public street. He and another inspector who had accompanied him told Mr. Arrington that the gasket needed to be repaired. Mr. Arrington had not repaired the gasket by August 3, the date cited in the Notices of Infraction.

The Notices of Infraction were mailed to Respondents by certified mail at 608 H Street, N.E., as evidenced by the certificates of service signed by the Government's representatives. The first Notice of Infraction was received by Respondents on September 7, 2000, as evidenced by the certified mail receipt filed by the Government.[2] The second Notice of Infraction was mailed to Respondents at the H Street address and has not been returned. The orders of October 18, 2000 and December 22, 2000 were received by Respondents on October 20, 2001 and December 27, 2001, respectively, as evidenced by the delivery confirmations contained in the record.

III. Conclusions of Law

A. Proper Notice

Respondents had adequate notice of both the charges and the hearing date as mandated by the Due Process Clause and by applicable statutes. The evidence shows that Respondents actually received the first Notice of Infraction, and the second Notice of Infraction has not been

[2] I left the record open until January 26, 2001 to allow the Government an opportunity to file the certified mail receipt. The receipt filed by the Government has been marked as Petitioner's Exhibit 103, and is hereby admitted into evidence.

returned by the U.S. Postal Service. Moreover, the evidence shows that Respondents actually received this administrative court's orders, which included copies of the Notices of Infraction. The evidence, therefore, is sufficient to demonstrate that Respondents received proper notice. *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Servs.*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 624 (D.C. 1985).

B. The Violation of Section 903.1

The first allegation in the Notice of Infraction is that Respondents violated 20 DCMR 903.1. That section provides:

> An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life and property is prohibited.

The Government introduced no evidence that the percholoroethylene odors emitted from Respondents' facility caused or threatened any injury to public health.[3] The charge of violating §903.1, therefore, can be sustained only if those odors interfered with "the reasonable enjoyment of life and property." While the question is close, I conclude that the presence of the unpleasant odor of perchloroethylene on the public street constituted an interference with the reasonable enjoyment of that area of public property in violation of §903.1. It is reasonable to expect that persons walking past Respondents' facility would be offended by a chemical order, and there is no evidence that any countervailing benefit was being achieved by Respondents' operation of the

[3] The perchloroethylene emitted from Respondents' facility is an "air pollutant" within the meaning of the regulation. "Air pollutant" includes, among other things, "fumes" "gas" "vapor" and "odor." 20 DCMR 199.1.

dryer with a broken gasket. The gasket had been broken for several weeks, and it is a reasonable inference that odors were being emitted to the public street throughout that period. In the absence of contrary evidence or argument, this combination of factors is sufficient to establish a violation of §903.1.[4]

C. The Violation of Section 707.1 (b)

The Notices of Infraction also allege that Respondents violated 20 DCMR 707.1(b), one of a series of standards contained in 20 DCMR 707.1. Section 707.1 is applicable only to "[t]he owner or operator of a percholoroethylene dry cleaning facility subject to this section . . . ." Two threshold questions are presented. First, what is a "perchloroethylene dry cleaning facility"? The rules do not appear to contain a definition of the term, but it is reasonable to construe it to refer to any dry cleaning facility using perchloroethylene as a cleaning agent. A separate series of rules prescribes standards for "petroleum solvent dry cleaning facilities," which appears to refer to facilities using petroleum-based cleaning agents. *See* 20 DCMR 706. The regulations, therefore, distinguish among dry cleaning facilities based upon the substances used to clean the clothes and fabrics. Respondents' facility, which uses perchloroethylene, accordingly is a "perchloroethylene dry cleaning facility" within the meaning of 20 DCMR 707.1.

[4] In an appropriate case, the benefits achieved by an odor-causing activity might need to be considered, along with the duration of the odor and the availability of a means of controlling it, in deciding whether an odor interferes with the "reasonable enjoyment of life or property." For example, unpleasant odors may be emitted onto a public street when painting the exterior of a house, but the temporary duration of the odor, the lack of a reasonable alternative to the odor-causing activity and the absence of an effective means to control the odor might lead to the conclusion that the odor was not an unreasonable interference with the enjoyment of the public space. In this case, the evidence discloses the presence of an unpleasant odor, which had been emitted for several weeks due to Respondents' failure to repair their equipment. That is sufficient to classify the odor as an interference with the "reasonable enjoyment" of public property.

The second threshold question is whether Respondents' facility is "subject to" §707.1. The "subject to" language appears intended to draw attention to 20 DCMR 707.2, which contains three exceptions to §§ 707.1(a) and (b), none of which applies in this case.[5] Respondents' facility, therefore, is "subject to" §707.1 and must meet its requirements.

The first applicable requirement is found in §707.1(a), which requires facilities to "[v]ent the entire dryer exhaust through a properly functioning carbon adsorption system or equally effective control device." Section 707.1(b), in turn, establishes a performance standard for the carbon adsorption system. It must be operated "so that it provides a ninety percent (90%) reduction in volatile organic compound emissions or so that it emits no more than one-hundred parts per million (100 ppm) of volatile organic compound from the dryer control device before dilution."

The Government's theory of the case is that Respondents violated §707.1(b) because the escape of perchloroethylene through the faulty gasket made it impossible for the carbon adsorption system to achieve the required 90% reduction in volatile organic compounds.[6] At first glance, it would appear that this theory would require a comparison of the concentration of percholoroethylene inside the dryer with the concentrations being emitted to decide whether the 90% threshold was being achieved, thereby requiring a determination of whether there is a sufficient foundation for Mr. Adebona's opinion that the concentration inside the dryer was not

[5] The exceptions apply to coin-operated facilities, facilities that can not accommodate a carbon adsorber due to inadequate space, or facilities with insufficient steam capacity to desorb an adsorber.

[6] It is not clear why the Government did not pursue a simpler theory, *i.e.,* that the faulty gasket resulted in a violation of §707.1(a) because the "entire dryer exhaust" was not being vented through the carbon adsorber.

greater than 500 ppm. The regulations, however, specify two alternative methods for determining compliance with §707.1(b): the use of a specific test described by the United States Environmental Protection Agency[7] or evidence of "[t]he proper installation, operation and maintenance of equipment which has been demonstrated to be adequate to meet the emission limits in §707.1(b)." 20 DCMR 707.9.

The regulations applicable to perchloroethylene dry cleaning facilities were enacted by the Council of the District of Columbia as part of the District of Columbia Air Pollution Control Act of 1984, D.C. Law 5-165. The legislative history of §707.9 reveals that the Council was concerned that requiring use of testing to demonstrate compliance in all circumstances would prove to be unduly expensive for both small operators and for the District itself. The Report of the Council's Committee on Public Works states that, to avoid such expenses, compliance could be determined "simply by evaluating the equipment which has been installed, meaning that equipment which has been known to result in compliance at other facilities need not be tested at all facilities to determine compliance." Report on Bill 5-168 (November 14, 1984) at 17. Thus, §707.9 (b) provides that a violation of §707.1(b) can be proved if an evaluation of the actual equipment installed at a facility reveals that it is not capable of achieving the required 90% reduction. No testing is required when relying upon this alternative.

Because there was no evidence that the EPA test was performed, Respondents' compliance with §707.1(b) must be determined by deciding whether Respondents properly installed, operated and maintained equipment that was adequate to meet the emission limits. Mr.

[7] The permitted test is a "test consistent with EPA Guideline Series document, '*Measurement of Volatile Organic Compounds,*' EPA-450/2-78-041." 20 DCMR 707.9(a).

Adebona testified credibly that the leak in the gasket impaired the ability of the carbon adsorber to function properly. Simply put, vapors were leaking out of the dryer and not passing through the adsorber. The adsorber could not perform the function of reducing emissions to the atmosphere if the vapors were not being passed through it. Consequently, the Government has met the burden imposed by §707.9(b) by demonstrating that the faulty gasket interfered with the proper operation of the carbon adsorber at Respondents' facility, and it has established that Respondents violated 20 DCMR 707.1(b).[8] It has done so regardless of whether Mr. Adebona had a sufficient foundation for his opinion about the concentration of perchloroethylene inside the dryer.

D. Fines and Penalties

Respondents' violation of 20 DCMR 903.1 is a Class 3 civil infraction, punishable by a fine of $100.00 for the first offense. 16 DCMR 3224.4(r); 16 DCMR 3201.1(c). Although the Notices of Infraction also seek a fine of $100.00 for the violation of 20 DCMR 707.1(b), that violation is a Class 4 infraction, subject to a fine of $50.00 for a first offense. 16 DCMR 3224.5(ff); 16 DCMR 3201.1(d). For Respondents' violations, therefore, I will impose a total fine of $150.00.

The Civil Infractions Act, D.C. Code §§ 6-2712(f) and 6-2715, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party can not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Code §§ 6-

[8] In the circumstances of this case, the interaction of §707.9 (b) with §§ 707.1(a) and 707.1(b) means that there is little difference, if any, between the elements of a §707.1(a) violation and a §707.1(b) violation.

2704(a)(2)(A), 6-2712(f). If a recipient fails to answer a second Notice of Infraction without good cause, the penalty doubles. D.C. Code §§ 6-2704(a)(2)(B), 6-2712(f). Because Respondents introduced no evidence of the reasons for their failure to answer the Notices of Infraction, there is no basis for concluding that they had good cause for their failure to answer the Notices of Infraction and no basis to suspend or reduce the applicable statutory penalty. That penalty, however, will be calculated based upon the proper fine for Respondents' §707.1(b) violation. Respondents, therefore, owe a penalty of $200.00 for failing to respond to the allegation of a §903.1 violation, and a penalty of $100.00 for their failure to respond to the allegation of a §707.1(b) violation. The total penalty, therefore, is $300.00, in addition to the fine of $150.00.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Respondents, who are jointly and severally liable, shall pay a total of **FOUR HUNDRED FIFTY DOLLARS ($450.00)** in accordance with the attached instructions within twenty (20) calendar days of the date of mailing of this Order (fifteen (15) calendar days plus five (5) days for service by mail pursuant to D.C. Code § 6-2715); and it is further

ORDERED, that, if Respondents fail to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest must accrue on the unpaid

amount at the rate of 1 ½% per month or portion thereof, beginning with the date of this Order. D.C. Code § 6-2713(i)(1), as amended by the Abatement and Condemnation of Nuisance Properties Omnibus Amendment Act of 2000, D.C. Law 13-281, effective April 27, 2001; and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Code § 6-2713(f), the placement of a lien on real or personal property owned by Respondents pursuant to D.C. Code § 6-2713(i), and the sealing of Respondents' business premises or work sites pursuant to D.C. Code § 6-2703(b)(6).

FILED 06/22/01

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John P. Dean
Administrative Judge